However on closer analysis it would also seem clear to me that the areas where the defendant has alleged that the plaintiff has misled the court are also the areas of dispute in the suit. The conflicting affidavits clearly indicate that it would be impossible to come to any definite finding on those disputed issues without a proper trial.

The law in granting or refusing interlocutory injunctions has a long and interesting history and the celebrated House of Lords case of *American Cyanamid Co.* v. *Ethicon*[3] was the most recent development. The simplest approach is expressed in an earlier case of *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.*[4] where the Lord Chancellor said:

"It is certain that the court will in many cases interfere and preserve property in *status quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights.... It is true that the court will not so interfere, if it thinks that there is no real question between the parties;... In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the Plaintiff."

The traditional theory underlying the grant or refusal of interlocutory injunction has always been that the court abstains from expressing any opinion upon the merits of the case until the trial — see *Wakefield* v. *Duke of Buccleugh.*[5] However more recently the courts have displayed what some refer to as a more robust approach, i.e. an approach guided by the apparent strength or otherwise of the plaintiff's case as disclosed in affidavits. In 1970 in *Cavendish House (Chettenhan) Ltd.* v. *Cavendish-Woodhouse Ltd.*[6] Harman L.J. (with Salmon L.J. concurring) said: "Therefore you start off with a *prima facie* case. That, of course is the essential prelude to the granting of interlocutory relief." This approach has now been abolished by the House of Lords in the *American Cyanamid case* and new principles have been set out in the following sequence. Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.

In *Fellowes* v. *Fisher* (C.A.)[7] Lord Denning discussed the *American Cyanamid case* and said that we are no longer to ask whether the plaintiff has made a *prima facie* case and that all we need ask now is the question whether there is a serious question to be tried. If there is, then we should take measures to preserve the *status quo* until the trial. In the *American Cyanamid case* the House of Lords held that there were serious questions to be tried and that on the balance of convenience, the right course was to grant an interlocutory injunction. The traditional rule of starting off with the test of *prima facie case* should no longer be applied. In fact the House of Lords in that case stated that they were taking the opportunity to declare that "there is no such rule". In *Hubbard* v. *Pitt*[8] Lord Denning again said of the principles involved that the first question to be asked is simply whether there was a serious question to be tried in the sense that the claim was not frivolous or vexatious. Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the *status quo.* It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.

Applying the above principles to the matters as disclosed in the affidavits in this case it is my view that the motion should be dismissed and the interlocutory injunction to remain. However having regard to the period of the tenancy in dispute it would be a proper case for me also to direct an early trial. Accordingly the motion is dismissed and an early trial ordered. Having regard to the fact that none of the points referred to above were brought out on behalf of the plaintiff I shall make no order as to costs.

Motion dismissed, early trial ordered.

Solicitors: *Lim Seng Chun & Co.; Lim Boon Seng.*

HAJI CHE SU BIN HAJI AWANG v. CHAN CHEONG

[A.C.J. (Abdul Razak J.) November 14, 1976]

[Kuala Trengganu — Civil Appeal No. 7 of 1973]

Workmen's Compensation — Worker — Meaning of — Right to appeal — Points of law — Public interest — Workmen's Compensation Ordinance, 1952, ss. 30(1) and (5) and 39(2).

This was an appeal against the decision of the arbitrator under the Workmen's Compensation Ordinance wherein he ordered the appellant to pay $2,016 to the respondent as compensation for injuries sustained by the respondent while working in the course of the appellant's employment. The appeal turned principally on the question whether the respondent was a "workman" within the meaning of the Ordinance. The arbitration came before the President of the Sessions Court on a purported reference made by the Commissioner of Labour under section 30(1) of the Ordinance.

Held: even if it could be said that the question whether the respondent was a workman was a point of law, it is not every point of law that gives a right to appeal; it must be a question of law of public interest. The fact that it is a question of law does not *per se* make it one of public interest.

Cases referred to:-

(1) *Golden Hope Rubber Estate* v. *Muniammah* [1965] 1 M.L.J. 5.
(2) *Smith* v. *General Motor Cab Co.* [1911] A.C. 188.
(3) *Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 548.
(4) *Lewis* v. *Stanbridge* Willis 175.
(5) *McNally* v. *Fitzgerald* Willis 175.
(6) *Ryan* v. *Tipperary* Willis 175.
(7) *Daniels* v. *Great Central Railway* Willis 176.
(8) *Underwood* v. *Perry* Willis 176.
(9) *Commissioner for Labour* v. *Chop Choong Joo* [1953] M.L.J. 76.

(10) *Oldroyd* v. *Turner* Willis 174.
(11) *Curtis* v. *Plumptre* Willis 173.
(12) *Williams* v. *Haigh* Willis 176.
(13) *Hayden* v. *Dick* Willis 172.
(14) *Paterson* v. *Lockhart* Willis 174.
(15) *Bray* v. *Kirkpatrick* Willis 173.
(16) *Mooney* v. *Sheohan* Willis 174.

CIVIL APPEAL.

Mrs. Mehta for the appellant.

Lee Leng Guan for the respondent.

Abdul Razak J.: This is an appeal against the decision of the arbitrator given on October 10, 1973 under the Workmen's Compensation for injuries sustained by the respondent while working in the course of the appellant's employment.

The appeal turned principally on whether the respondent was a "workman" within the meaning of the Ordinance. The facts of the case were quite simple. The appellant was a contractor. The respondent was engaged to make houses. On November 27, 1971 he went to work as usual. He was nailing a plank on the roof of one of the houses when he fell 12 feet down and was injured on the left foot. his back and also on his elbow. He was hospitalised for 60 days. According to the medical report at page 2 of the record he had a slight limp due to a shortening of $\frac{5}{8}$" of the left leg and some stiffness of the left ankle. The limp would very likely be permanent. The physical disability was 15%.

The arbitration came before the President, Sessions Court on a purported reference made by the Commissioner of Labour under section 30(1) of the Ordinance which provides that if any question arises under the Ordinance which could not be settled by agreement between the employer, worker and the Commissioner such question shall be decided by the arbitrator. Sub-section 5 of the section provides, *inter alia*, that the reference to the arbitrator shall contain the questions on which agreement has or has not been reached. Such reference can be made by the employer, workman or Commissioner on behalf of the workman, on his own motion. Pursuant to this provision the Commissioner made reference to the arbitrator as set out in Form at page 8 of the record setting out, *inter alia*, the following points of agreement and disagreement:

Matters on which there was agreement

(a) that the respondent was a worker as defined in the Ordinance,

(b) that the accident happened in the course of the respondent's employment and while working.

Matters on which there was no agreement

(a) whether the employer has to pay the compensation of $2,200 or part of the said sum,

(b) whether the employer has to pay the compensation as awarded.

It would appear that since the parties have agreed that the respondent was a worker, this point has therefore ceased to be an issue on the appeal. But even so, he would still have no right of appeal because the question of whether the respondent is a worker is a question of fact and not law and he would be barred by section 39(2) of the Ordinance from appealing. Further, it is not every point of law that qualifies a right to appeal; it must be a question of law of public interest. The fact that it is a question of law does not *per se* make it one of public interest. Here, the only interest as I see it which is involved is one strictly pertaining to the appellant himself and that is hardly a public interest. Otherwise, one only needs to say that he is a worker to bring him within the ambit of section 39(2) and that would be opening the floodgate to all and sundry appeals. This is especially so since there has been no hard and fast rule whether in a given type of work a person can be deemed to be a worker or an independent contractor. I shall amplify on this later. I think the simplest way to say whether a matter is of public interest is to say (on the assumption that a worker in one instance is not necessarily a worker in another) in what way does the fact that the appellant claims the respondent to be an independent contractor is of interest to the public. If the decision would be binding on all workers in the country or in a locality or would be a useful precedent, it may be said to be of public interest. But where a determination of whether a person is a worker is itself a question of fact and as stated above variable, how could such determination be one of public interest let alone one of law. I suppose it would be said here that there was not sufficient evidence for the arbitrator to make his finding that the respondent was a worker and thus on the basis of *Golden Hope Rubber Estate* v. *Muniammah*,[1] this would be a question of law. But with great respect, in my view, that alone does not necessarily qualify a person to invoke section 39. It says the question must be one which it is desirable in the public interest to have determined and nowhere in the judgment in that case was the learned judge's mind directed to this crucial fact. In this respect, one must distinguish our statute from its English counterparts in 1896 and 1906. Under the latter (see 2nd schedule para. 4 English Workmen's Compensation Ordinance 1906) reference to the judge by the arbitrator can only be made by the arbitrator himself. Secondly, the arbitrator is not necessarily a lawyer of some experience. And thirdly, the reference need only be *on a question of law*. One will thus notice that our legislature had made quite distinct departures from the English provisions in that firstly the reference to the High Court can be made by the parties themselves. Secondly, the arbitrator must be none other than a President Sessions Court and thirdly, reference can only be made in respect of a question of law which it is desirable in the public interest to determine. What was, therefore, the object of these departures? Obviously to ensure that every opportunity is given to the aggrieved party to seek further redress, which under the English law is restricted, but without allowing at the same time all and sundry types of appeal to be made as to defeat the purpose of having arbitration in the first place. This construction must be so from the fact that under the English statute reference to the judge can only be made by the arbitrator himself on a point of law but there being no special qualification, legal or otherwise, required of him to act as such, it was obvious

there would be a great tendency that an arbitrator baffled as usual by the distinction of law and fact might well in ignorance refuse to refer to court a matter which could well be a question of law and thus causing an unnecessary injustice. Our Act clearly seeks to remedy that situation by providing that the arbitrator shall be a lawyer of some experience in the person of the PSC himself and also allowing appeals to be made from the decision of the arbitrator to the judge provided it is on a question of law *of public interest*. In so providing, the Act in other words assumes that the PSC being an experienced lawyer would be competent enough to deal with the question of fact and law. Such things, therefore, as to whether there is sufficient evidence or not which had been treated as a question of law which would ordinarily not necessarily be within the competence of a layman arbitrator as in England could easily be dealt with by our arbitrator, leaving thus only the question of law on a matter of public interest to be dealt with by the High Court. That in my view must be so if only because the alternative is to clog the court with meaningless and unnecessary appeals. It seems obvious to me that the essence of the Workmen's Compensation Ordinance is to dole out compensation to the injured workers who could not afford to wait, as expeditiously and as cheaply as possible by means of less formal enquiry and if possible by agreement and compromise done at the Commissioners', and at its highest, the arbitrators' level. To say, therefore, a person has a right nevertheless of appeal on the basis merely of insufficiency of evidence when invariably the dividing line between sufficiency and insufficiency is extremely thin if not difficult to determine at its face value is merely to prolong rather than shorten that process; it would have the effect of nullifying the object of arbitration altogether because then every decision of the arbitrator can be alleged to be lacking in evidence and be subject to appeal. The essence of all Arbitration Acts is that the arbitrator's award shall be conclusive and binding on the parties and unless as in England the Arbitration Act is excluded (see Workmen's Compensation Act 1906 para. (4) of the 2nd Schedule) and to the extent only of any qualification which the legislature may provide in the Act itself, as in our case, with regard to appeal on a question of law of public interest, then the arbitrator's decision must if arbitration is to have any meaning be final. English authorities on this point i.e. on the right of appeal to the High Court from the arbitrator, where our and English statute laws are clearly and distinctly at variance with one another can therefore be quite misleading. Such cases like *Smith* v. *General Motor Cab Co.*[2] which were based on the Workmen's Compensation Act 1906 should therefore be accepted with a great deal of caution if not disregarded. In saying that our case is a determination on a question of fact, I may, with great respect, seem to be at variance with my brother Judge Fred Arulanandom on whose certificate the appellant had appealed. But apart from what I have said regarding the insufficiency of evidence, I have been at pains to find any authority to say that a determination that a person is a worker is a question of law let alone one of public interest. In fact the authority seems to say to the contrary. Cozens-Hardy M.R. in *Simmons* v. *Heath Laundry Co.*[3] says:

"In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a 'workman'. This is not a question of law, but a question of fact, and, unless the arbitrator has misdirected himself, this court ought not to interfere."

There has been no suggestion here that the arbitrator has misdirected himself on the law and on the facts.

Be that as it may, the question of whether a person is a worker or not is one of great difficulty and has harrassed the courts from time to time. Since no two situations can be the same and each case has had to be decided on its own merits it merely emphasises the force of the argument that it is but a determination on a question of fact. *Willis's Workmen's Compensation* at page 172 says:

"The task of determining between a case of independent contract and the relationship of master and servant is often one of great difficulty, especially where the remuneration is based upon the amount of work performed. In such cases the power of control will generally prove to be the decisive test. The existence of a document describing the arrangement as a 'contract' is not conclusive, but the real meaning of the arrangement is to be considered."

The difference between a worker and one who is not really turns on whether the contract is of service or for service. Thus *Willis* at page 162 says:

"The cardinal rule under the definition is that there must be the relationship of master and servant, and the contract which creates that relationship must be in existence at the time of the accident.... Whether or not that relationship exists is a question of fact and a finding one way or the other cannot be disturbed if there be evidence to support it."

Willis says further at page 163:

"For the purpose of determining this question of fact it is necessary to consider carefully the character and terms of the engagement; the payment of wages or remuneration; the power of dismissal; and the power of controlling the work of the alleged servant."

Fletcher Moulton L.J. said in *Simmons* v. *Heath Laundry Co.* cited above; at page 549:

"The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service."

What are the facts in this case which induced the arbitrator to decide that this is a contract of service. The respondent said that he was a carpenter and paid at $12 per day. He worked from 8 a.m. to 5 p.m. with lunch break from 12 noon to 12.30 p.m. He was employed to build houses. He worked with four other carpenters. He built the houses according to the plan provided by the appellant. The appellant used to visit and see the progress. He agreed since no one supervised him he worked on his own. The appellant asked him to assist in searching for the four other carpenters. He fixed the wages for the other carpenters. They worked also on their own. He did not supervise their work. The tools belonged to each of them. The same plan was used by the five of them. He did not discuss with the appellant regarding the period of termination of his services. The appellant told him he must build and

complete five houses within 6 months. He was told to be in charge of the four houses built by the four others. He was asked to keep a record of the number of days the four others worked. At the end of the month he produced the records to the appellant. The appellant would pay him the money and he would pay the four others. The appellant did not tell him whether he was covered by Workmen's Insurance Policy. He could not stop as and when he liked because the appellant would get angry with him. In my view, the President Sessions Court was right in deciding there was sufficient evidence of control. These facts would have been relevant. He had to work on fixed hours and at a fixed salary. Houses were to be built according to plan. The appellant used to visit and see the progress of the work. He was asked by the appellant to be in charge of the 4 houses built by the other four carpenters. He was asked to keep a record of the number of days the four others worked. He could not stop when he liked because the appellant would get angry with him. It might be argued that since the respondent said he worked on his own and no one supervised him that this could be inferred as evidence to show that he was an independent contractor. But this is not necessarily so as the following cases will show. In *Lewis* v. *Stanbridge*[4] — a decorator was employed by a builder to paper a house but he had complete liberty in matters of hours of working. In *McNally* v. *Fitzgerald*[5] — a plumber was engaged to do repairs to a house, paying him by time, providing him with materials but the owner only looked in at times to see how things progressed. In *Ryan* v. *Tipperary*[6] — a quarryman was employed. He was paid 1s. a ton of stones broken to a certain size. He could commence and discontinue work when he pleased and could obtain assistance in doing the work. In *Daniels* v. *Great Central Railway*[7] — the deceased was employed to clean boilers as and when required. He was paid 30s. for each boiler he cleaned. He worked with materials provided by respondents and did so at his own times and without supervision. He had none of the privileges usually accorded to respondents' servants. In *Underwood* v. *Perry*[8] — the applicant was engaged in breaking up scrap metal by blasting. He worked in his own time and when he liked. He provided his own explosives. Alcock C.W.C. in *Commissioner for Labour* v. *Chop Choong Joo*[9] appears to have said that a carpenter was a category of independent contractors. He says:

> "Cases of more skilled workmen — carpenters, painters, mechanics and the like — where there is some *skill* or *craftsmanship* employed, may require to be classified as contract for services, because skill is used to achieve an indicated result but where it is primarily muscular strength which was given, then I find it very hard to believe that in that type of work a workman is involved in a contract for services." (the emphasis is mine).

But in my view, with respect, that proposition tended to go too far. He seemed to have considered that skill in one and the use of muscular strength in the other were the primary factors which determined whether a contract was one for services or of service. Cases, however, have shown that whether a person was or was not a worker was not necessarily determined by the fact of him being muscular or skilled. In *Lewis* case cited above, a decorator requires no less a skill than a painter or a carpenter who was nevertheless held to be a worker. That I think goes also to the plumber reported in *McNally* above. On the other hand, in *Oldroyd* v. *Turner*[10] — a plumber was held to be an independent contractor. On the other hand, the mere fact that it involved muscular work did not follow that a person was a worker and not an independent contractor. Thus in *Curtis* v. *Plumptre*[11] — a tree-feller was held to be an independent contractor whereas in *Williams* v. *Haigh*[12] — a person employed to lop the trees of the appellant was held to be a worker. Again in *Hayden* v. *Dick*[13] a quarryman was held to be an independent contractor. But in *Paterson* v. *Lockhart*[14] — he was held to be a worker. In *Bray* v. *Kirkpatrick*[15] — a carter was held to be an independent contractor. In *Mooney* v. *Sheohan*[16] however he was held to be a worker. These and other instances merely showed that the fact that one was skilled or muscular did not point to whether he would be an independent contractor or a worker. It depends on whether inspite of the nature of work that he was doing he was subject to some form of control.

There was evidence that the appellant took out an Insurance cover for the respondent. Indeed it was stated by the appellant that he would agree to pay the compensation only if his Insurance Company would but the insurers had refused to pay for some reason or the other known to them. So, the reason for him not wanting to pay was clearly not because the respondent was not a worker but because of the refusal of his insurance to pay him. The taking of insurance *per se* would not, of course, decisively show that the respondent was a worker but it would help to show at least the state of mind of the appellant to corroborate the evidence of control, since he must either have thought that the respondent was a worker or at worst must have been in doubt as to whether he was one. Surely, therefore, where he was in doubt himself it was difficult for the appellant to say that the arbitrator had gone wrong. There was another fact which could not be ignored. The appellant agreed at page 7 of the record that he had signed a memorandum of agreement on November 12, 1972 to pay the said $2,016 to the respondent. It surprised me to know why in the circumstances the reference was made to the arbitrator at all because if so then under section 30 of the Ordinance there could not have been a reference to the arbitrator.

For the above reasons, I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *Wilson & Co.; Lee & Co.*